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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, McCORKLE AND ENGELMAN

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BRIEF FOR RESPONDENTS, McCORKLE AND ENGELMAN

Counter-Statement of Questions Presented

1. Do the provisions of the Social Security Act governing the federal categorical assistance programs indicate

a congressional intention to prohibit the payment of welfare to strikers?

2. Is it appropriate to look to the general provisions of the National Labor Relations Act to find the intention of Congress concerning the payment of welfare to strikers where the conditions of eligibility for welfare are set forth specifically and comprehensively in the Social Security Act?

Counter-Statement of the Case

On June 10, 1971, two affiliated New Jersey corporations, Super Tire Engineering Company and Supercap Corporation (referred to hereinafter as "Super Tire"), and their President and Chief Executive Officer, filed suit in the Federal District Court for New Jersey, alleging that the employees of Super Tire were on strike and that many of the strikers were receiving public assistance under the Assistance for Dependent Children (N.J.S.A. 44:10-1, *et seq.*) and General Assistance (N.J.S.A. 44:8-107) laws of the State of New Jersey (App. 12-15). The complaint claimed *inter alia* that the payment of public assistance to strikers is not authorized by the New Jersey welfare statutes, that it is contrary to the provisions of the Federal Social Security Act governing the AFDC program (42 U.S.C. §601 *et seq.*) and that it conflicts with the provisions of the Labor Management Relations Act of 1947 (29 U.S.C. §141 *et seq.*) guaranteeing free collective bargaining. The named defendants in the original complaint were the New Jersey Commissioner of Institutions and Agencies and Director of the Division of Public Welfare, who are the administrative officials responsible for the state's welfare programs, and two county welfare offi-

cials.* Subsequently, the collective bargaining representative of Super Tire's employees, Teamsters Local Union No. 66, was granted leave to intervene as a defendant (App. 1).

The matter was brought before the District Court on June 24, 1971 on the motion of Super Tire for a preliminary injunction (App. 26-35). The defendant state officials moved on the return date to dismiss the complaint for failure to state a cause of action (App. 37) and the parties agreed that the case should be determined on the merits at that time (App. 45). After hearing the arguments of counsel, the District Court granted defendants' motion to dismiss (App. 46).

An appeal was then taken by Super Tire to the Third Circuit Court of Appeals which, with Judge Gibbons dissenting, dismissed the appeal as moot because the strike out of which it arose had ended, and directed the District Court, on remand, to vacate its judgment and to dismiss the complaint as moot (App. 47-74).

After a petition for rehearing in banc filed by the Chamber of Commerce of the United States of America was denied by the Third Circuit (App. 108), Super Tire filed a Petition for Writ of Certiorari. Although its petition was concerned mostly with the Third Circuit's holding of mootness, the third question presented was: "Does the State grant of welfare assistance to strikers contravene federal labor policy by insulating one party—the striking union—from the economic disadvantages of a strike, and thus deviate from the State's required neutral position in collective bargaining?" The response filed by

* The Attorney General of New Jersey represents only the two state officials. The county welfare officials have not participated actively in the litigation.

the Attorney General of New Jersey to the petition indicated that the State would not take a position on whether the Court should review the Third Circuit's dismissal on grounds of mootness, since it had not urged disposition of the case on this ground. Consistent with that position, this brief is limited to a discussion of whether Congress has prohibited the payment of welfare benefits to strikers.

Summary of Argument

The right of strikers to receive welfare benefits is a question of basic eligibility under the provisions of the federal categorical assistance programs. Since Congress has included comprehensive provisions dealing with conditions of eligibility in the pertinent sections of the Social Security Act, the Court should look to the Social Security Act rather than the National Labor Relations Act to ascertain the intent of Congress concerning the payment of welfare benefits to strikers. A review of the legislative history of that Act and related statutes shows that Congress has been aware of the controversy concerning the payment of welfare benefits to strikers but that it has refrained from enacting any prohibition against such benefits. Furthermore, since any restriction upon the payment of such benefits would raise complex policy questions, such as whether ineligibility should extend to the entire family of a striker, the subject is inherently one which Congress would have to deal with by express provisions in the Social Security Act if it intended to establish a prohibition. Therefore, the Court should find that the absence of any prohibition in the Social Security Act against the payment of welfare to strikers leaves the states free to pay such benefits.

ARGUMENT

The states may pay welfare benefits to strikers, because the provisions of the Social Security Act, which deal comprehensively with conditions of eligibility under the federal categorical assistance programs, do not prohibit such benefits.

This case involves the interpretation of the provisions of the Federal Social Security Act establishing the program of Aid to Families with Dependent Children (hereinafter AFDC), as they relate to the payment of benefits to families in which a wage earner is on strike, and the impact, if any, of the National Labor Relations Act (hereinafter NLRA) upon the interpretation of those provisions. Since the case turns on the intent of Congress in enacting the Social Security Act and the NLRA, it is appriopriate to review the relevant legislative history of these acts and their later amendments.

The federal AFDC program provides financial aid on a joint federal-state basis for needy children who have been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" and are living with any one of a specified group of relatives. 42 U.S.C. §606(a). See generally *King* v. *Smith*, 392 U. S. 309 (1968). When a state elects to participate in the AFDC program, it is entitled to matching funds in accordance with the statutory program only if its AFDC program, as embodied in its "state plan," complies with the requirements of the Social Security Act. *Rosado* v. *Wyman*, 397 U. S. 397 (1970). As originally enacted, the benefits of the AFDC program were limited to needy children themselves. 49 Stat. 629 (1935). By a 1950 amend-

ment, benefits also may be paid to meet the needs of the caretaker relative of a dependent child. 64 Stat. 551 (1950). Neither the original Act nor the 1950 amendment conditioned eligibility for AFDC benefits for either dependent children or their relatives on whether they were employed or available for work. The only criteria for eligibility were that (1) a dependent child had been deprived of the support of a parent by virtue of death, disability or absence from the home, and (2) the need requirements set by the State had been met. In short, the availability of AFDC benefits revolved solely around the *needs* of eligible families.

Consistent with these objectives, there is no suggestion in the legislative history that Congress intended to establish any barrier to the receipt of benefits by families which include individuals who are on strike. While there was no specific discussion of this subject at the time of the enactment of the original legislation, the problem was not one of which congressmen in the 1930's would have been unaware. It is clear that benefits had been paid to strikers under the Federal Emergency Relief Act, which was the immediate predecessor of the categorical assistance provisions of the Social Security Act (see Bureau of Social Science Research, Inc., *Legislative History of the Aid to Dependent Children Program* 12-16 (1970)), and that such payments had been the subject of considerable controversy during the period immediately preceding enactment of the Social Security Act. See A. Thieblot and R. Cowin, *Welfare and Strikes: The Use of Public Funds to Support Strikers*, 34-36 (1972); I. Bernstein, *Turbulent Years: A History of the American Worker, 1933-1941*, 307-308 (1970). Furthermore, the Railroad Employment Insurance Act (45 U.S.C. §351, *et seq.*), enacted in 1933, provided compensation for strikers under

specified conditions. 45 U.S.C. §354 (a-2) (iii). One commentator has observed of the Administration's position in those years:

> "The position taken by Hopkins and the New Deal Administration toward welfare payments to strikers was consistent with their belief that sound public policy required governmental assistance to unions if collective bargaining and equality of union power with that of management were to be achieved. Just as the Wagner Act sought to encourage collective bargaining by enhancing union power, so welfare payments to strikers sought to sustain unions when they required assistance." A. Thieblot and R. Cowin, *supra*, at 35.

If Congress had desired to prohibit this practice under the categorical assistance provisions of the Social Security Act of 1935, it could easily have inserted a provision to this effect. Instead, it limited the conditions of eligibility to need alone. Similarly, if Congress had desired to prohibit payments to strikers under the Unemployment Compensation Act (42 U.S.C. §1304), also enacted in 1935, it could have done so. Instead, it elected to confer substantial discretion upon the states to determine their own conditions of eligibility. (See, 79 Cong. Rec. 5782 (1935) (remarks of Congressman Cooper); *Id.* at 9284 (remarks of Senator Wagner)). Finally, the NLRA, also enacted in 1935, established a comprehensive statutory code for industrial relations, but Congress was silent with respect to the payment of public funds to strikers. It thus appears that in enacting the NLRA, the Unemployment Compensation Act and the AFDC provisions of the Social Security Act in 1935, Congress had ample opportunity to enact a prohibition against the

payment of public funds to strikers, but it refrained from doing so and thereby permitted such payments to be paid. A. Thieblot and R. Cowin, *supra,* at 36-43.

During the course of subsequent amendments to the federal labor laws, the subject of the payment of public funds to strikers appears to have been raised only once. In the original House version of what became the Labor Management Relations Act of 1947, there was a provision which would have deprived strikers of the right to collect unemployment compensation but would have left their right to collect welfare benefits unaffected. 1 N.L.R.B., *Legislative History of the Labor Management Relations Act,* 1947, at 303-304 (1948). However, this provision was eliminated from the final bill, thus indicating an absence of congressional sentiment that the implementation of national labor policy required such a measure.

The AFDC provisions of the Social Security Act were amended numerous times after 1935. 53 Stat. 1379 (1939); 64 Stat. 549 (1950); 70 Stat. 848 (1956); 72 Stat. 1048 (1958); 75 Stat. 75 (1961); 76 Stat. 185 (1962); 79 Stat. 414 (1965); 81 Stat. 877 (1968); 85 Stat. 802 (1971); 86 Stat. 1485 (1972); see generally, Bureau of Social Science Research, Inc., *supra,* at 89-267. Several of these amendments would have provided appropriate occasions for the insertion of a prohibition against the payment of welfare benefits to strikers if Congress had been so minded. In 1950, the benefits of the AFDC program, previously limited to needy, dependent children, were extended to the relatives caring for such children, thus making such benefits available to adults for the first time. Congress could have then enacted a prohibition against the payment of benefits to strikers but, consistent with its basic humanitarian objective to provide minimal support not just for dependent children but also their caretaker relatives (see Bureau of Social Science Research,

Inc., *supra,* at 159-160), the amendment was silent on the subject. In 1961, the AFDC program, which previously had required as a condition of eligibility that one parent be dead, disabled or absent from the home, was extended to two-parent families in which the father was unemployed. See Bureau of Social Science Research, Inc., *supra,* at 198-204. This would have been an obvious occasion for Congress to address the subject of welfare benefit strikers, since the 1961 amendment made federal categorical assistance benefits potentially available to a large number of labor organization members who theretofore would not have met the conditions for eligibility. But again, the amendment was silent on the subject. Finally, in 1967 Congress enacted a detailed set of amendments which require AFDC recipients to participate in work training programs and to seek employment. See generally, *New York State Department of Social Services* v. *Dublino,* 93 S. Ct. 2507 (1973). Although this amendment added a provision requiring the states to disregard the needs of specified recipients who refuse without cause to accept employment, no similar exclusion was provided with respect to strikers. In short, despite continuous congressional reconsideration of the conditions for AFDC eligibility, no attempt was made prior to 1972 to exclude the families of strikers from the program.

The common understanding which has evolved during the course of the legislative history of the AFDC program, that strikers are eligible for its benefits, is also reflected in recent congressional action to enact a prohibition against the payment of such benefits. In 1972, the Administration introduced welfare reform legislation which, as reported out by the Senate Finance Committee, contained an explicit provision to deny strikers benefits under the AFDC program. S. Rep. No. 92-1230, 92nd Cong., 2d Sess. 108, 472-473 (1972). This proposal was debated

on the Senate floor (118 Cong. Rec. 16815, 17049-17052), but was deleted before the bill was voted upon. *Id.* at 16815.

The fate of this proposal was the same as that of other recent attempts to amend welfare and unemployment compensation provisions to exclude strikers from benefits. An Administration attempt to repeal the striker benefits provisions of the Railroad Employment Insurance Act by the provisions of S. 560, 92nd Cong., 1st Sess. (1971) was defeated, and another provision which would have prevented states from granting unemployment compensation to strikers was deleted by the House Ways and Means Committee. H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 18 (1969). Most significantly, an attempt to exclude strikers from the food stamp program, which is closely interrelated with the AFDC program (see 7 C.F.R. §271.3), was not only defeated, but resulted in the enactment of 7 U.S.C. §2014(c), which expressly provides:

> ". . . Refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment."

The House Committee on Agriculture explained its reasons for adding this provision as follows:

> "The committee debated at length the question of striker participation in the Food Stamp Program; it rejected a provision which would have automatically made strikers ineligible for food stamps. In lieu of such a provision the committee adopted language which clearly states that no person (neither a striker nor a nonstriker) need accept employment or training at a struck plant or site. The committee does not wish to take sides in labor

> disputes and does not believe this bill is the proper place to solve labor-management problems." H.R. Rep. No. 91-1402, 91st Cong., 2d Sess. 11 (1970).

Thus, the only recently enacted amendment concerning public aid to strikers was premised on the congressional view that government neutrality in labor disputes can only be maintained if strikers are afforded the same opportunity as non-strikers to secure such benefits.

It is in the light of this legislative history that the intent of Congress concerning the payment of welfare benefits to strikers must be determined. Initially, it should be pointed out that, notwithstanding the petitioners' formulation of the question presented, the question of congressional intent here is not a preemption issue. As this Court observed only last term in a case involving the 1967 Work Incentive Program amendments to the Social Security Act,

> "Tnis is not a case involving arguable federal preemption of a wholly independent state program dealing with the same or a similar problem . . . AFDC is a federal statutory program. . . ." *New York State Department of Social Services* v. *Dublino, supra,* 93 S. Ct. at 2512, n. 9.

It is also of vital significance to this case that whether strikers may receive AFDC benefits is a question of basic eligibility to participate in the program, and that Congress itself has dealt comprehensively with the conditions of eligibility under AFDC, rather than leaving this subject to the discretion of the states. 42 U.S.C. §602(a)(10). See *King* v. *Smith, supra; Carleson* v. *Remillard,* 406 U. S. 598 (1972); *Townsend* v. *Swank,* 404 U. S. 282 (1971). The Social Security Act has thus been

the direct vehicle by which the will of Congress has been expressed concerning conditions of eligibility to receive AFDC benefits.

In light of the legislative history outlined above and the present statutory farmework of AFDC, it cannot reasonably be argued that the Court should look to the NLRA for any expression of congressional intent concerning the payment of welfare benefits to strikers. Insofar as this case concerns the payment of benefits to strikers pursuant to the AFDC program, it is manifest that since the pertinent provisions of the Social Security Act deal directly with the conditions of eligibility for public assistance, whereas the NLRA on its face has absolutely nothing to do with public assistance, the Social Security Act should be treated as the governing law. And since the Social Security Act does not prohibit the payment of categorical assistance to strikers, the states may pay such assistance in the administration of the federal welfare programs.

While it may be less obvious, the same is true with respect to state public assistance programs. To hold otherwise, it would be necessary to conclude that while Congress refrained from enacting such a prohibition as a part of the federal categorical assistance programs, there should nevertheless be imputed to Congress an intention to prohibit the payment of state general assistance to strikers. Certainly, the state general assistance programs serve the same basic humanitarian objective of providing minimal subsistance to the needy as do the federal categorical assistance programs. It should also be noted that the federal categorical assistance programs are the dominant public assistance programs in effect in this country today, providing benefits to the largest number of recipients

and for the most part at higher levels than state enacted and funded programs.* Since Congress has not found it appropriate to prohibit the payment of benefits to strikers under the federal programs in order to effectuate the objectives of national labor policy, it simply would not make sense to impute a contrary conclusion to Congress with respect to the essentially auxiliary and supplementary state general assistance programs. As the Court stated in *New York State Department of Social Services* v. *Dublino, supra*:

> "Where coordinate state and federal efforts exist within a complementary administrative framework, *and in the pursuit of common purposes,* the case for federal pre-emption becomes a less persuasive one." 93 S. Ct. at 2517. (Emphasis added).

Furthermore, it is significant that it has been generally assumed that welfare benefits may be paid to strikers. A majority of states currently provide such assistance and many apparently have done so since the early days of the AFDC program. A. Thieblot and R. Cowin, *supra,* at 9-12, 36-38, 143-185; see also *Lascaris* v. *Wyman,* 61 Misc. 2d 202, 305 N.Y. Supp. 212 (1969); *Strat-o-Seal* v. *Scott,* 72 Ill. App. 2d 480, 218 N.E. 2d 227 (1966). New Jersey has had an administrative regulation authorizing the payment of welfare to strikers since 1957 (App. 129-132) and there is no evidence, notwithstanding the previous absence of a formal regulation, that strikers have ever been denied welfare benefits in New Jersey. Finally, the United States Department of Health, Education and Wel-

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* There are a total of 13,985,900 recipients of aid under the federal categorical assistance programs out of a total of 14,732,000 in all federal and state aid programs. Of the total of $11,244,234,000 spent on welfare, $10,517,294,000 is paid through the Federal categorical assistance programs. Dept. of Health, Education and Welfare, Publication No. 74-03100, National Center for Social Statistics Rept. A-2 7/73), Public Assistance Statistics, Tables 1 and 2.

fare has repeatedly approved the "state plans" of states such as New Jersey which permit the payment of AFDC benefits to strikers. The Department's approval of the payment of such benefits was formally expressed recently by the adoption of a regulation (App. 123-125).* It is of course well established that such a long-standing interpretation of the law by the agencies responsible for its enforcement will be given weight by the courts. (*Rosado* v. *Wyman, supra,* 397 U.S. at 415).

The approach to interpretation of congressional intent appropriate in this case is similar to the one followed in *DeVeau* v. *Braisted,* 363 U.S. 144 (1960). In that case, a section of the New York Waterfront Commission Act prohibiting convicted felons from soliciting contributions from union members was challenged as being in conflict with and therefore pre-empted by the provisions of the NLRA which guarantee workers the right to bargain collectively through "representatives of their own choosing". In rejecting this challenge, the Court placed particular emphasis upon the fact that part of the Act had been enacted as a constitutional compact between the States of New York and New Jersey, and had then been approved by Congress. Although the section of the Act which prohibited felons from collecting money from union members was not part of the compact, it did include a provision for the licensing of workers on the waterfront which barred convicted felons from receiving licenses except with the special permission of the bi-state Waterfront Commission. The compact and report submitted with it to Congress also showed

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* The State does not take any position herein concerning the validity of the regulation insofar as it permits a state to deny AFDC benefits to strikers. See *Francis* v. *Davidson,* 340 F. Supp. 351 (D. Md. 1972) *aff'd* 409 U.S. 904 (1972). The only relevant point with regard to this case is that the regulation permits such payments if the State chooses to make them.

that one of the primary reasons for the enactment of the compact and supplementary waterfront legislation had been the infiltration of criminal elements into waterfront labor organizations. Since Congress had these objectives before it for consideration, the Court found that it had given indirect approval to the state prohibition against felons collecting money from union members, which made it unnecessary for the Court to ". . . imaginatively summon the likely reaction of Congress to the state legislation, as a basis for ascertaining whether due regard for congressional purpose bars the state regulation." 363 U.S. at 153.

The arguments for finding an intent in the NLRA to prohibit the payment of welfare benefits to strikers and their families are even weaker than the preemption arguments rejected in *DeVeau* v. *Braisted*. This case involves not simply state legislation to which Congress has given an indirect imprimatur by approval of a bi-state compact, but rather, at least in part, legislation regarding a major federal program—AFDC—which has been the subject of constant congressional attention in passing upon very substantial annual appropriations as well as numerous amendments to the governing law. In addition, whereas the preemption argument in *DeVeau* v. *Braisted* was constructed around express provisions of the NLRA guaranteeing the right of workers "to bargain collectively through representatives of their own choosing" and the even more express provisions of the Labor-Management Reporting and Disclosure Act of 1959 relating to the disqualification of labor officials from holding union offices, the employer in this case relies solely upon a vague principle of "governmental neutrality in collective bargaining" which it contends is implicit in the NLRA. This is particularly significant in vew of the fact that the Court's decisions relied upon by Super Tire have been grounded

upon express provisions of the NLRA. See e.g., *Nash* v. *Florida Industrial Commission*, 389 U. S. 235 (1967); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955). Therefore, it is even clearer here than in *DeVeau* v. *Braisted* that the establishment of a congressional prohibition against the payment of welfare benefits to strikers should not be indirectly inferred from the provisions of the NLRA. Instead, in view of the fundamental issues of national labor and welfare policy which would be implicated, it should be assumed that Congress would enact such a provision in direct and unambiguous language if it were felt to be necessary in the implementation of national labor policy. *Cf. New York Department of Social Services* v. *Dublino, supra.*

Furthermore, the Court has already held, albeit by a summary affirmance, that the NLRA was not intended to affect state legislation dealing with the payment of welfare benefits to strikers. In *Francis* v. *Davidson*, 340 F. Supp. 351 (D. Md. 1972) (three-judge court) *aff'd* 409 U. S. 904 (1972), a number of strikers brought suit claiming that they had been improperly denied benefits under the unemployed father segment of the AFDC program. In opposing this claim, it was argued that the denial of benefits was valid because the payment of such benefits to strikers would violate statutes enacted by Congress in the field of labor relations. The District Court flatly rejected the argument, stating:

> "Congress [has not], by the enactment of labor laws having national scope, in any way, by the terms of those statutes or otherwise indicated that those laws or the policies underlying them are intended to control the resolution of those opposing viewpoints of social welfare which underlie the

> differences between the Maryland and the contrary rules relating to the grant or denial of AFDC-E benefits to those out of work because of involvement in labor disputes." 340 F. Supp. at 363-364.

Since this same contention was presumably made in the Jurisdictional Statement filed in the appeal, the Court by its summary affirmance in *Francis* v. *Davidson* has already rejected the argument that federal labor law prohibits the payment of welfare benefits to strikers.

Since it is the Social Security Act and not the NLRA to which the Court must look to ascertain the intent of Congress concerning the payment of welfare benefits to strikers, it is unnecessary for a court, as directed in *ITT Lamp Division of Int. Telephone & T. Co.* v. *Minter*, 435 F. 2d 989, 993 (1st Cir. 1970) *cert. den.* 402 U. S. 933 (1971) (see also *Grinnell Corp.* v. *Hackett*, 475 F. 2d 449 (1st Cir. 1973) *cert. den.* 94 S. Ct. 164 (1973)), "to weigh the impact on the state of declaring needy strikers and their families ineligible for welfare against the extent to which making them eligible stripped state government of its neutrality in a labor-management dispute." The hearing and weighing of such evidence would place a court in the position not of implementing the purpose of Congress as expressed in the federal labor laws, but rather of enacting legislation indirectly touching upon the NLRA and directly affecting the categorical assistance provisions of the Social Security Act.* It is axiomatic

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* The essentially legislative nature of this issue is well indicated by the data which the Court of Appeals in *Minter* said should be considered before a court could rule on the issue:

(Footnote continued on following page)

that such "judicial legislating" is beyond the province of the courts. *Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U. S. 330, 342 (1960).

The conclusion that the NLRA was not intended to have any effect upon either federal or state welfare programs draws further support from the elusiveness of the principle of neutrality which the petitioners claim the

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(Footnote continued from preceding page)

> "Under such an approach, a court would be interested in how many states permit strikers to receive welfare; whether or not strikes tend to be of longer duration where welfare is received, any studies or expert testimony evaluating the impact of eligibility for benefits on the strikers' resolve; a comparison between strike benefits and welfare benefits; the impact of the requirement that welfare recipients accept suitable employment; how many strikers actually do receive welfare benefits; and a host of other factors. In addition, the state's legitimate interests must also be considered: its interests in minimizing hardship to families of strikers who have no other resources than the weekly pay check, its concern in avoiding conditions that could lead to violence, its interest in forestalling economic stagnation in local communities, etc." 435 F. 2d at 993.

The Court of Appeals in *Minter* seemed to recognize that Congress should be the forum to resolve these conflicting considerations:

> "This very catalogue of data relevant to a macrocosmic weighing, which a court, if called upon would have to undertake, indicates the preferable forum to be the Congress. Congress would be particularly appropriate in resolving this issue." 435 F. 2d at 993-994.

However, its opinion inexplicably fails to pursue the logic of these remarks, which point to the conclusion that the requisite showing of *a congressional intention* to prohibit the payment of welfare to strikers simply cannot be found. See also *Grinnell Corp.* v. *Hackett*, *supra*.

NLRA embodies. We live in an era in which the influence of government is pervasive. Consequently, it would be neither reasonable nor practical to view the participants in a labor dispute as though they were operating in a laboratory environment beyond the reach of governmental aid or regulation. Would the petitioners urge that an employer whose workers are on strike should be denied an advance on a government contract, a government guarantee on an emergency loan to maintain solvency during a strike, or the right to take a tax write-off for strike-related losses? Would the petitioners urge that strikers who live in public housing must be evicted, that their children should be denied government financial assistance to attend school, or that government may not delay a foreclosure action on the home of a striker who cannot pay his taxes? Thus, it is clear that criteria for the maintenance of "government neutrality" would be difficult to establish.

Indeed, it can be persuasively argued in the present context that the denial of welfare benefits to strikers would destroy rather than maintain equality of bargaining position between employer and employee, thereby placing the government on the side of the employer and penalizing the employees for striking. See Comment, *Welfare Assistance to Strikers in Need: The Protestant Ethic Revisited,* 67 Nw. U. L. Rev. 245 (1972). It should be noted in this connection that New Jersey does not automatically make welfare benefits available to strikers. The State simply takes the position that this circumstance should not disqualify an applicant from receiving benefits. The critical sections of the governing regulation provide:

> "4. No individual shall be presumed to be unwilling to work, or to be wrongfully refusing to accept

suitable employment, merely because he is participating in a lawful labor dispute.

5. An individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy.

6. In the case of an applicant for public assistance who is participating in a lawful labor dispute, there shall be an investigation of need and other conditions of eligibility, and an evaluation of income and resources, in the same way and to the same extent as in all other cases. In such instances, 'strike benefits' or other payments available to the individual from the labor union or other source, shall be considered a resource and shall be determined and accounted for." (App. 131).

If the NLRA contained the neutrality principle for which the petitioners contend, it would be strongly arguable that the position most consistent with that principle would be that already taken by New Jersey, that the fact an applicant for assistance happens to be on strike is irrelevant in determining his eligibility for public assistance.

The insubstantiality of the argument that Congress intended by enacting the NLRA to prohibit the payment of welfare benefits to strikers is further indicated by the absence of any clear statement of the scope of the alleged disqualification. Would the principle of neutrality require the denial of welfare benefits to a worker who has been subject to a lockout? It would hardly be fair to exclude a worker from benefits to which he is otherwise entitled solely because of such unilateral action by an employer, but a worker who has been locked out is as much a party to a labor dispute as a striker and the

abstract logic of the alleged neutrality principle thus might require that he too be denied benefits. Would acceptance of the petitioners' contentions mean that workers who were receiving welfare benefits before going on strike would be disqualified from receiving any benefits at all while on strike?* It would certainly be difficult to view such a disqualification as anything other than a penalty for striking. Does the neutrality principle espoused by the petitioner require that the entire family of a striker must be barred from receiving welfare benefits or only the striker himself? If the entire family were barred, the disqualification imposed on a striker's family would be more severe than that suffered by a family in which a recipient simply refuses without good cause to accept employment, since in the latter instance the family may continue to receive benefits provided the needs of the recipient who has refused employment are not taken into account. 42 U.S.C. §602 (a) (19). As previously suggested, to place the families of strikers in a worse position than the families of the indolent would appear to impose a penalty for striking.

This is not to say that Congress may never choose to enact a sweeping disqualification of strikers and their families from the receipt of welfare benefits, to effectuate what it may perceive in the future to be the needs

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* Is is not uncommon for members of labor organizations who are not on strike to receive welfare benefits, since with the exception of the unemployed father segment of AFDC, the federal categorical assistance programs do not require a recipient to be unemployed and the high standard of need in many states, coupled with the income disregard provisions of 42 U.S.C. §602(a) (8), permit some workers, particularly ones with large families, to receive not just wages but also welfare benefits. See *X* v. *McCorkle*, 333 F. Supp. 1109 (D. N. J. 1970) modified *sub. nom*, *Engelman* v. *Amos*, 404 U.S. 23 (1971).

of national labor policy. However, the delicate policy questions raised by the petitioners' argument merely underscore the fact that if Congress had intended to prohibit strikers from receiving welfare benefits, it would have specifically included such a prohibition in the Social Security Act. Therefore, the Court should find that the absence of any prohibition in the Social Security Act against the payment of welfare to strikers leaves the states free to pay such benefits.

CONCLUSION

It is respectfully submitted for the foregoing reasons that if the Court reverses the judgment of the Court of Appeals ordering dismissal of the case as moot, it should affirm the action of the District Court dismissing the complaint for failure to state a cause of action.

Respectfully submitted,

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